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No. [redacted] 193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

AETNA INSURANCE COMPANY,
Petitioner,

v.

C. A. VERNON AND MARIANNE VERNON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 30, 1962.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals for the Fifth Circuit are not yet reported. The text of these opinions, however, is found in Appendix A hereto. The District Court's opinion is reported in 189 F. Supp. 233, and is found in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 1962, with the Chief Judge dissenting. A petition

for rehearing was filed on April 20, 1962; an order denying such petition was entered May 11, 1962, and again the Chief Judge dissented.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED[1]

1. After the passage of The McCarran Act of 1945 (15 USC 1011-12), is a United States Court of Appeals authorized to fashion a public policy for the State of Texas on insurance matters, circumscribing the right of freedom of contract, in an area which the regulatory statutes of Texas leave to decision by the application of the common law and principles of equity?

2. When a right is granted solely by state legislative creation and is not derived from the common law or principles of equity, or when a right existing at common law or under the principles of equity is withdrawn by state legislative act, may a United States Court of Appeals extend the operative effect of the state statutes creating or with-

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[1] In the event this Petition for Certiorari is granted, Petitioner would like to present these further questions on the merits: (1) Is a policy containing a provision that:

> "This policy shall be void if the assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in the case of any fraud, attempted fraud, or false swearing by the assured touching any matter related to this insurance or the subject thereof, whether before or after loss"

violated when an insured after suit has been filed admits under oath that no insured loss occurred and that such claimed loss was a hoax and a scheme to defraud the insurance company, thereby putting the insurance company to the trouble and expense of defending the action and asserting its cross-action; but later, when motion for summary judgment is filed by the insurer, the insured files an alleged controverting affidavit renouncing the first affidavit as untrue, but when faced with criminal prosecution for perjury, says that the controverting affidavit was not given under oath? (2) May this Court and the Court of Appeals consider the record made in an examining trial before a United States Commissioner concerning the criminal charge of perjury against one of the Respondents, arising out of the filing of the alleged second affidavit mentioned in question (1), when the proof there made is inconsistent with the position taken by Respondents in the Court of Appeals and is in fact determinative of the issues involved in this case?

drawing such right beyond their precise ambit to fashion a generalized state public policy for insurance matters?

3. Is a United States Court of Appeals authorized to fashion for any state a public policy on insurance matters which puts a premium on the false swearing, fraud, attempted fraud, and "blatant perjury" of the insured?[2]

4. Is a controverting affidavit presented in opposition to a motion for summary judgment filed in bad faith when the insured, faced with criminal prosecution for perjury arising from the filing of the affidavit, proves by the Notary Public (an associate of one of the attorneys of record) that the controverting affidavit was not made under true oath, so that criminal prosecution is avoided; nevertheless, the insured continued to urge on appeal from the granting of the motion for summary judgment in this case that the controverting affidavit was actually made under oath and was valid to raise material issues of fact?

STATUTES INVOLVED

Title 15 USC 1011-12; Title 28 USC 1652. Text of the above articles appears in Appendix C.

Applicable Texas Statutes appear in Appendix D.

STATEMENT

Respondents seek damages against Petitioner in the amount of $32,700.00 under the provisions of a personal property floater insurance policy for loss sustained to jewelry caused by burglary or theft. The case was filed originally in the District Court of Brazos County, Texas, naming Petitioner Aetna Insurance Company, a corporate citizen

[2] Chief Judge Tuttle in his dissent said: ". . . I must nevertheless reject as erroneous and, I sincerely believe, as damaging to the entire fabric of the law, the characterizing of this open, *blatant perjury* as a "mere fact of making inconsistent statements." (Emphasis added).

of Connecticut, and its adjuster, an individual, who is a resident of Texas, as defendants. The suit was filed on behalf of Respondents by the District Attorney of Brazos County, Texas, acting as private counsel for Respondents.[3] He withdrew from the case prior to the time answer was required, after receiving the information in his official capacity as District Attorney that possibly a criminal fraud had been committed by his clients. The Grand Jury indicted Respondent C. A. Vernon for participating in a conspiracy to defraud; however, without any of the alleged co-conspirators taking the stand, a benevolent Texas jury acquitted Respondent C. A. Vernon.

The case was removed to the United States District Court, Southern District of Texas, Houston Division. Petitioner there contended that the resident citizen had been fraudulently joined as a party defendant to prevent the attachment of federal jurisdiction. Such contention was sustained by the District Court, and no complaint of such action was made on appeal by Respondents. The basis for federal jurisdiction in the first instance is diversity of citizenship and amount involved.

Petitioner filed its first motion for summary judgment in the District Court based upon an affidavit of Marianne Vernon, the principal insured, dated May 20, 1960, by which she confessed that the alleged act of theft and burglary was a complete hoax and was part of a conspiracy between her father, C. A. Vernon, her mother, and herself, to defraud Petitioner of the proceeds of the insurance policy (R. 20, 23).

After several postponements of the hearing on Petitioner's motion for summary judgment, Respondent filed an affidavit of Marianne Vernon in which she renounced her first affidavit as being untrue, stating in effect that she

[3] This procedure is permitted by Texas law.

was induced to make such affidavit by her illicit lover by whom she was then pregnant. She stated that she made the second affidavit, embroiling her mother, father, and herself in a crime, because of her apprehension that her lover would go to the penitentiary for committing it. (R. 28).

At the hearing on Petitioner's motion for summary judgment, the District Court, in view of these conflicting affidavits, ordered the United States District Attorney for the Southern District of Texas to investigate whether perjury had been committed in this case (R. 33). Petitioner was granted leave to amend its motion for summary judgment in order to plead the fraud and false swearing clause of the policy (quoted in Footnote 1 of this Petition). After writing an opinion (189 F. Supp. 233) the District Court rendered a summary judgment in favor of Petitioner. (R. 57).

Notice of Appeal and Bond were filed by Respondents on January 4, 1961. The original record was received and docketed by the Clerk of the Court of Appeals for the Fifth Circuit on February 3, 1961.

On March 2, 1962, pursuant to the investigation ordered by the District Court, and after the arrest by the Federal Bureau of Investigation of Respondent Marianne Vernon, upon the charge of perjury, an examining trial was held before the United States Commissioner for the Southern District of Texas, Houston Division. Testimony was adduced at this hearing by which Respondent Marianne Vernon sought to prove that the second affidavit in which she renounced the first affidavit was not given under oath because the Notary Public signing the affidavit had both religious and individual scruples against administering an oath. The Notary Public so testifying was a lawyer and an associate of one of the attorneys of record in this cause.

After such testimony by the Notary Public, the perjury charges were dismissed.

Nevertheless, on May 15, 1961, Respondents filed their brief in the Court of Appeals for the Fifth Circuit, urging that the second affidavit of Marianne Vernon was sworn; thereby genuine issues of fact were created.

Contemporaneously with filing its brief in the Court of Appeals for the Fifth Circuit, Petitioner filed in that Court the following:

1. Motion to Invoke Penalties for Presenting and Urging the Validity of Affidavits in Bad Faith (R. 63) and Brief in Support thereof (R. 71).
2. Motion to Strike (R. 78).
3. Motion for Inclusion of Transcript in Record (R. 81).

The Court of Appeals for the Fifth Circuit in reversing the District Court's judgment in favor of Petitioner made no direct holding in regard to these motions, but by inference denied them in footnote number 3 to the majority opinion.

REASONS FOR GRANTING THE WRIT

1. The majority opinion of the Court of Appeals for the Fifth Circuit is contrary to the spirit and letter of The McCarran Act of 1945 (15 USC 1011-12); and conflicts either directly or in principle with the applicable decisions of this Court, other Courts of Appeals, its own decisions, and the decisions of the Supreme Court of Texas.

(a) McCarran Act of 1945.

The majority opinion admits that there are no Texas statutes governing false statements, fraud, or attempted fraud by the insured occurring after loss other than Article 21.19 (Appendix C), dealing solely with "proofs of loss or

death". Thus, by extending the applicable limits of Article 21.19 and Article 21.16, Texas Insurance Code (Appendix C) — this latter statute applying solely to false statements made in an application for insurance or in the contract of insurance — the Court below erroneously fashions a public policy of Texas as to *all* false statements, fraud, or attempted fraud occurring after loss.[4]

Clearly, therefore, the Court of Appeals in the instant case is regulating by federal judicial fiat the business of insurance in the State of Texas in an area which the Texas Legislature has left to the common law and principles of equity. As Congress has remained silent on the subject, the Court of Appeals for the Fifth Circuit is in direct violation of the clear terms of The McCarran Act of 1945 (15 USC 1011-12).

The decision of this Court in *Wilburn Boat Company* v. *Firemen's Fund Insurance Company*, 348 U.S. 310,[5] emphasizes the correctness of Petitioner's position. Here, this Court held that where no established rule concerning admiralty risks of insurance existed by United States statute or decisions of its Court, state regulatory statutes would apply. Therefore, if the Texas Legislature has regulated only false statements and misrepresentations contained in "proofs of loss or death", its obvious determination of Texas public policy is that all other areas and means by which false statements or misrepresentations may be made are governed by the common law and principles of equity without statutory qualification.

(b) Conflict with decisions of other Courts of Appeals.

Petitioner having thus demonstrated that common law

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[4] See *Patton* v. *United States*, 281 U.S. 276 (306): "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection."

[5] This case is again before this Court on Certiorari, Number 910, October term, 1962.

and the principles of equity, rather than any Texas statute, are applicable to the instant case, the holding of the Court below[6] is in direct conflict with the decisions of the Eighth Circuit Court in *Columbian Insurance Company of Indiana v. Modern Laundry*, 277 F. 355[7] and of the Fourth Circuit in *Globe & Rutgers Fire Insurance Company* v. *Stallard*, 68 F. 2d 237.[8]

(c) Conflict with decisions of this Court.

In addition to the conflict in principle with this Court's rules for judicial determination of public policy (supra, footnote 4), and the construction of The McCarran Act of 1945 contained in *Wilburn Boat Company* v. *Firemen's Fund Insurance Company, supra*, there is a direct conflict on the substantive law question involved in this case between the Fifth Circuit and this Court. In *Clafin* v. *Franklin Insurance Company*, 110 U.S. 81, this Court held (p. 95) that *attempted* fraud occurring after loss was a complete defense to the claims of the insured and that intent to

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6 ". . . only falsehoods which are material to the risk if made before loss occurs and only those which are material, fraudulently made, and which mislead the insurer and cause it to lose some valid defense, if made after the loss occurs, may be made the basis of voiding the policy pursuant to a forfeiture clause.

7 "The provision of the policy 'that the policy shall be void if the insured has made any attempt to defraud the company, either before or after loss' was a plain, unambiguous contract, binding upon each of the parties to it. That agreement was not that if the insured, before or after the loss, made any attempt to defraud the company, except in instances in which such an attempt could not and would not deceive the insurer, and except in instances in which such attempt was unsuccessful, the policy should be void. No exception is expressed or indicated by the clear and comprehensive terms of the agreement or by the situation or circumstances of the parties when they made it. In such a state of the facts, Courts may not lawfully conceive and engraft upon the contract such exceptions. The fact that the parties did not set them out in their written contract is conclusive that their minds never met upon them and they never intended to make them."

8 "The policy is voided not only for fraud, but also for false swearing by the insured touching any matter relating to the insurance or the subject thereof 'whether before or after loss'. If the condition were against fraud alone, the argument as to reliance by the company might be pertinent; but the condition against false swearing is broken when a false oath is knowingly and willfully made by the insured as to any matter material to the insurance or the subject thereof."

deceive would be implied from the insured's giving false answers to material facts.

(d) Conflict with decisions of the United States Court of Appeals for the Fifth Circuit.

In *Chaachou v. American Central Insurance Company*, 241 F. 2d 889 (1957) the Court of Appeals for the Fifth Circuit adopted the rules stated by the Fourth and Eighth Circuits and by this Court previously discussed.[9]

Further, the decision of the Court below is in conflict, if not directly, surely in principle, with a decision of the Fifth Circuit rendered only seven days prior to the decision in the instant case: the *Wilburn* Case (before the Court for the third time).[10]

In its latest decision concerning the *Wilburn* Case, the Court of Appeals for the Fifth Circuit held that the promise of the insured to refrain from fraud, attempted fraud, or false swearing, whether before or after loss, was a promissory warranty, breach of which voided the policy. In the instant case, the Court of Appeals for the Fifth Circuit refused to accord such clause the status of a promissory warranty, and engrafted exceptions upon such clause by sheer implication.

(e) Conflict with decisions of the Texas Courts.

The Supreme Court of Texas has decided two cases which demonstrate clearly that the extension of Articles 21.19 and 21.16 beyond their precise terms is unwarranted to

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[9] The Court took notice of Article 21.19, Texas Insurance Code, but said nothing in its opinion indicating that its provisions would extend beyond "proofs of loss or death".

[10] Which way the decision went in these two cases depended upon which three of the nine judges of the Court of Appeals were designated to hear them. Judge Hutcheson joined by Judge Rives constituted the majority in the instant case. Chief Judge Tuttle dissented. In the *Wilburn* Case, Chief Judge Tuttle joined by Judge Jones constituted the majority, and Judge Hutcheson dissented. Thus, by the quirk of Chief Judge Tuttle losing the support of Judge Jones, Judge Hutcheson was able to override the week-old decision by persisting in the views rejected by the Court the preceding week.

determine a generalized public policy in insurance matters for the State of Texas.

In *Johnson, et al* v. *Darr, et al*, 272 SW 1098 (1925) the Court held:

> "When a right is *solely and exclusively of legislative creation*, and does not derive existence from the common law or principles of equity, and *creates a new right by statute*, the courts will *not extend the application of the statute, but will limit its application to the exact words of* the act." (Emphasis added).

In the case of *Board of Insurance Commissioners* v. *Guardian Life Insurance Co.*, 180 S.W. 2d 906 (1944) it said:

> "The board can exercise only such authority as is conferred upon it by law *in clear and unmistakable terms* and the same will not be construed as being *conferred by implication*." (Emphasis added).[11]

Also, under Texas law, it has been held uniformly that only the People by passing a Constitutional provision and the Legislature by passing a statute, have authority to declare the public policy of the state.[12]

2. Surely the action of the Court below in this case "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for the exercise of this Court's power of supervision."

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[11] These decisions are supported by decisions of the Court of Civil Appeals of Texas, *Modern Order of Praetorians* v. *Davidson*, 203 SW 379 (1918) no writ history); *Lone Star Finance Company* v. *Universal Automobile Insurance Company*, 28 SW 2d 573 (1930, no writ history); *Home Insurance Company* v. *Springer*, 131 SW 2d 312 (1939, no writ history), and *Freeman* v. *Commercial Union Assurance Company*, 317 SW 2d 563 (1958, writ refused, n.r.e.).

[12] *District Grand Lodge No. 25, Grand United Order of Odd Fellows* v. *Jones, et al*, 160 SW 2d 915 (1942); *Castillo* v. *Canales*, 174 SW 2d 251 (1943). See 11 American Jurisprudence §139, p. 814: ". . . the rule has become securely settled that *all questions of policy are for the determination of the legislature, and not for the courts*." (Emphasis added)

(a) The fiasco of having contradictory opinions emanate from one Court within one week's time is detrimental to the basic principle that all law shall be applied uniformly. Further, supervision is here necessary to require the Court of Appeals for the Fifth Circuit to comply with its own rule which seeks "to secure or maintain uniformity or continuity in the decisions of the Court."[13]

(b) For the Court below to allow Respondent Marianne Vernon to contend that an affidavit is valid for the purpose of avoiding criminal prosecution for perjury, but at the same time, to allow her to contend that such affidavit is valid for purposes of a civil suit, is simply unconscionable. This Court should certainly supervise this action by invoking the penalties provided under the law and rules of Court. The question of applying sanctions under Rule 56(g) Federal Rules of Civil Procedure, has not reached this Court. In fact, only one decision applying such sanctions has been found: *Munson Line* v. *Green*, 6 F.R.D. 470 (D.C., N.Y: 1947). *Federal Practice and Procedure*, Barron and Holtzoff, Vol. 3, Sec. 1243, page 203.

Generally, the Federal Rules of Civil Procedure apply only in the District Court, but in this case, the evidence of bad faith was developed after the District Court lost jurisdiction by the appeal to the Court of Appeals. Accordingly, the orders that originally could have been entered by the trial court may be entered by the appellate courts.[14]

3. The questions presented by this Petition, clearly, are of importance sufficient for this Court to hear and judge the merits of the case. Here, there is intrusion by a Federal Court into an area specifically reserved to the States by the

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[13] Rule 25(a) Rules of the United States Court of Appeals for the Fifth Circuit.

[14] *Toledo Scale Co.* v. *Computing Scale Company*, 281 F. 488, affirmed 261 U.S. 399. See Title 18 USC 401

McCarran Act of 1945. Such intrusion seeks to fix a Federal Judge-made public policy for Texas in insurance matters, different from other states, and violative of the will of the Texas Legislature.

Supervision of the lower courts to prevent irreconciliable decisions from emanating from one Court of Appeals within one week's time is important and necessary for the proper administration of justice. Likewise, as a matter of first impression, this Court's important supervisory power should be invoked to determine whether the processes of the courts have been abused and thwarted by filing of the conflicting affidavits of Respondent Marianne Vernon.

4. Based on the herein reviewed decisions of this Court, the Courts of Appeals for the Fourth and Eighth Circuits, and the Court of Appeals for the Fifth Circuit itself, as well as the Texas Supreme Court, it is submitted that Petitioners position is in accord with the applicable and controlling rules of law. It is reasonable to expect that this Court, after a hearing on the merits, would decide this case favorably to Petitioner. Traditionally, this Court has rejected every contention that puts a premium on fraud, attempted fraud, false swearing, and "blatant perjury".

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

A, B, C and D

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18840

C. A. VERNON AND MARIANNE VERNON,
Appellants,

v.

AETNA INSURANCE COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

(March 30, 1962)

Before TUTTLE, Chief Judge, and HUTCHESON and RIVES, Circuit Judges.

HUTCHESON, Circuit Judge: The case is before us upon appeal from a summary judgment rendered in behalf of the insurer, appellee here, in an action by the insured on a personal property floater policy of insurance. As a statement of the facts of the case will show, this is another of those all too numerous instances of the mis-use of the summary judgment procedure to cut a trial short; as so often before, it has served only to prove that short-cutting of trials is not an end, and that in the conduct of trials, as in

other endeavors, it is quite often true that the longest way around is the shortest way through.[1]

Among the articles of property covered by the policy were certain scheduled pieces of jewelry of the value of $49,150.00. Appellants stated in their original petition that on or about January 17, 1960, some of the jewelry, valued at $27,700.00, was taken from their home under circumstances constituting burglary or theft. Aetna, the insurer, was made aware somehow,[2] that the insured claimed the right to recovery for a covered loss, and denied liability because, according to appellants' petition, of Aetna's stated belief "that plaintiffs were liars and frauds". Appellants then instituted suit in a district Court of Texas for the amount of the alleged loss and punitive damages. The suit was removed on petition of the insurer to the United States District Court for the Southern District of Texas.

On May 20, 1960, before Aetna had filed its answer in the suit, Marianne Vernon, one of the plaintiffs-appellants and owner of most of the jewelry, subscribed and swore to a statement in which she declared that the burglary or theft of jewelry which was the basis of her claim against Aetna was in fact feigned by her father, C. A. Vernon, the other appellant herein, pursuant to a plan for obtaining a recovery on the policy, to which she, her mother, and her father were all parties.

On May 23, 1960, Aetna filed its answer, relying affirmatively on the defense that a clause in the policy provided:

> "This policy shall be void if the assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject

[1] Gray Tool Co. v. Humble Oil & Refining Co., 186 F (2) 365. Cf. Colby v. Klune, 178 F (2) 872; Doehler Metal Furn. Co. v. U. S., 149 F (2) 130 at 135.; Kennedy v. Silas Mason, 334 U. S. 249 at pp. 256-7; Sartor v. Ark. Natural Gas Corp., 321 U. S. 620 at p. 627; Peckham v. Ronrico, 171 F (2) 653 at p. 657; Whitaker v. Coleman, 115 F (2) 305.

[2] Appellants claim that the proofs of loss required by the policy were filed within the time limits therefor; appellee claims that they were not. The truth of the matter is not in issue on his appeal.

> thereof or in case of any fraud, attempted fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

and that the action of C. A. Vernon, Marianne Vernon, and Mrs. C. A. Vernon, as described in Marianne Vernon's statement of May 20, 1960, was a clear violation of this clause, voiding the contract. In addition, Aetna filed a counterclaim for actual and punitive damages.

Thereafter, on September 8, 1960, Aetna moved for partial summary judgment, with Marianne Vernon's affidavit of May 20, 1960 attached, on the ground that the Vernon's fraud vitiated the insurance and released the liability of the insurer as a matter of law. On October 17, 1960, no controverting affidavits having been filed, the motion was set for hearing on October 31st. Prior to the date set for hearing, however, on October 28th, C. A. Vernon, his wife, and Marianne Vernon all executed affidavits repudiating Marianne's affidavit and denying knowledge of, or complicity in, the theft of the insured jewelry as sworn to by her. In repudiating her statement of May 20, 1960, Marianne Vernon stated:

> "I have read the statement made and executed by me on May 20, 1960. The representations in that statement regarding the theft of jewelry from our house are not true. I had no prior knowledge of the theft, was *not in anyway implicated, and I do not know the* whereabouts of the jewelry.
>
> "I was induced to make and sign this statement out of fear for the liberty of Mark Tenalio." [This man had been employed by investigators representing the insurer to make inquiries in Bryan, Texas, where the Vernons lived] "At the time I made the statement I was deeply in love with Mark Tenalio. He had asked me to marry him and I was pregnant by him. He told

me that if I did not 'help to clear him' he would go to the penitentiary for this theft. I did not want the father of my unborn child to be a convict, so, together we invented this story about my father and mother. It is all false."[3]

On October 31, 1960, a hearing on Aetna's partial motion for summary judgment was held. At this time the court had before it all of the affidavits referred to above. After stating that the affidavits raised material issues of fact, and announcing that the motion for summary judgment would be overruled, the court granted Aetna leave to file an amended motion. The amended motion abandoned the motion for partial summary judgment made in connection with the Aetna's counter claim, set up the policy provision voiding the policy in the event of fraud, attempted fraud, or false swearing by the insured, and the two affidavits executed by Marianne Vernon, and urged that since one of the affidavits must necessarily be false, the policy provision was violated and the policy voided.

Finding that the two affidavits given by Marianne Vernon established fraud, attempted fraud, false swearing, concealment and misrepresentation, as a matter of law, the

[3] Subsequent to the rendition of judgment in this case, Marianne Vernon was charged by complaint with perjury in connection with her statement of October 28, 1960. Upon a hearing before the United States Commissioner, it appeared that the notary who signed Marianne Vernon's statement in his official capacity had no independent recollection of the statement, and that while he did not usually require an affiant to raise his or her hand and swear, it was his custom to determine if the affiant has read the statement and to ask the affiant if the statement is true. The complaint was dismissed on motion of the United States.

As to appellee's contention that Marianne Vernon's second statement did not constitute an affidavit and was, therefore, insufficient to raise issues of fact in defense of a motion for summary judgment, if it be assumed, without deciding, that a statement not made under the pains and penalties of perjury under Texas law would be inadequate to raise issues of fact in defense of a motion for summary judgment, this would not avail appellee, for the showing made before the Commissioner in the case at bar was not, in our opinion, sufficient to impair the technical validity of the statement as an affidavit. See Vaughan v. State, 177 SW (2) 59 (Tex. Crim. App. 1943), *reh. denied*.

district court rendered judgment for Aetna. The published opinion may be found at 189 F. Supp. 233.

Appellee was entitled to judgment on its motion only if there were no genuine issues as to any material fact and if the uncontroverted facts established its right to judgment as a matter of law. Fed. R. Civ. P. 56 (c). State law is controlling, and the question we must decide is whether, under the law of Texas a provision in a policy of insurance purporting to void the policy in the event of fraud, attempted fraud, or false swearing by the insured may be invoked as the basis for a summary judgment when the insured executes two affidavits of the character of those involved in the instant case by taking one or both as false. Aetna urges both that the policy provision in question should be construed to require that, because of the making of two affidavits, the policy be voided, and that this result is not contrary to Texas law. We shall examine both of these propositions.

The Texas Insurance Code (Acts 1951, 52d Leg. ch. 491). Art. 21.16 provides that any provision in a policy which provides that untrue or false answers or statements made in the application or contract shall render the policy void shall not constitute a defense to a suit on the policy unless it is shown upon trial that the matter or thing represented was material to the risk or actually contributed to the contingency or event upon which the policy became payable. Materiality is a question of fact. Article 21.19 provides that a provision voiding a policy for false statements made in the proofs of loss shall be ineffective as a defense unless it is shown upon trial that the false statement was fraudulently made, misrepresented a fact material to the liability of the insurer, and that the insurer was thereby misled and caused to waive or lose some valid defense to the policy. It will be observed that the foregoing statutory provisions apply

by their terms only to false statements made in the application for the policy or in the proofs of loss, respectively. So far as we have been able to determine, no Texas statute or decision deals directly with the question of avoidance of a policy because of false statements made subsequent to the institution of suit upon the policy, after denial of liability by the insurer. The statutory provisions referred to above do, however, bespeak the public policy of Texas in insurance matters. Part of a comprehensive Insurance Code and remedial in nature, they are to be construed liberally to accomplish the legislative purpose, with the evil to be remedied kept clearly in view. *Mecca Fire Ins. Co. v. Strickler*, 156 S.W. 353 (Civ. App. 1911), no writ history; *McPherson v. Camden Fire Ins. Co.*, 222 S.W. 211 (Comm. App. 1920).

The policy plainly revealed by these provisions is one flatly opposed to the use of forfeiture clauses to avoid the obligations of insurance contracts solely upon a showing that the insured has made, at any time, a false statement with respect to the insurance or the subject thereof. Under the statutory scheme, only those falsehoods which are material to the risk, if made before the loss occurs, and only those which are material, fraudulently made, and which mislead the insurer and cause it to lose some valid defense, if made after the loss occurs, may be made the basis for voiding a policy pursuant to a forfeiture clause.

To be sure, the Legislature, in expressing its policy, referred specifically to only two kinds of false statements, those in the application and those in the proofs of loss. The reason for this is apparent. These are the only kinds of statements, in the vast majority of cases, which the insured will ever make to the insurer, and are by far the most important which can be made, for the former serves to provide the information upon which the insurer determines to accept or refuse the risk, and the latter notifies the insurer

of the occurrence of the risk insured against and the circumstances surrounding it. The Legislature having specifically prohibited the forfeiture of policies because of falsity (unless the insurer can demonstrate existence of the statutory prerequisites to voiding the policy) in even those communications with the insurer upon which the latter might ordinarily be expected to rely most, it follows that false statements of lesser consequence, such as the affidavits in this case, though not specified in the statute are nonetheless included within the same prohibition.

Chaachou v. *American Central Insurance Company*, 241 F (2) 889 (5th Cir. 1957) is not authority to the contrary. Explicitly predicated upon "the absence of statute, E.g., Art. 21.19, Texas Insurance Code, V.A.T.S.", that case was decided under the law of Florida. It dealt with false statements made in the proofs of loss and was a case in which fact questions regarding the statements had been submitted to a jury, rather than, as here, taken as undisputed.

We turn next to examination of the contract provision upon which Aetna relies in its effort to avoid the policy. In doing so, we are not unmindful of the principle that policies are to be construed most strongly against the insurer and so as to avoid a forfeiture, if possible. *Burns* v. *American National Ins. Co.* 280 S.W. 762 (Comm. App. 1926); *Kelly* v. *American Ins. Co.*, 316 S.W. (2) 452, aff'd 325 S.W. (2) 30, *reh. den.* The plain meaning of the words of the provision taken in their broadest possible scope, is that any falsely sworn statement by the insured, made at *any* time, under *any* circumstances, to *any* person or entity is sufficient to void the policy. While the provision was obviously inserted for the sole benefit of the insurer, who now naturally contends for a literal interpretation, it must be remembered that it is a contract which we are here considering, not a fiat. We are unconvinced that any insured would

agree to the construction contended for by Aetna. Under that construction, the slightest falsehood by the insured, even in a sworn pleading or upon the witness stand in a court of law, no matter how immaterial, no matter how innocent the insured, no matter how well-known the truth to the insurer, so long as it related to the insurance or the subject thereof, would summarily void the policy as a matter of law. It is absurd to suggest that any insured would knowingly assent to such a provision. Yet the false statements here complained of were made, not to the insurer, as it appears, but for the purposes of this litigation, almost as if the insured had indeed pleaded them or made them upon the witness stand as in the hypothetical situation just suggested. We find quite convincing the construction placed on such contractual provisions by authorities which have held that such provisions do not extend to false swearing after suit is instituted on the policy. See *American Paint Service* v. *Home Insurance Co. of New York*, 246 F(2) (3rd Cir. 1957); *Deitz* v. *Providence Washington Ins. Co.*, 33 W. Va. 526 (1890).

Moreover, as we have indicated, construed as the appellee urges, the provision in question would be invalid and void as contrary to the public policy of Texas.

We conclude that the provision does not extend to every false swearing, but only to those within the scope allowed by the public policy of the state. It does not extend to the affidavits made by Marianne Vernon after denial of liability by Aetna and after action on the policy had commenced.

It is apparent from what we have said, that the mere fact of making inconsistent statements does not establish fraud or attempted fraud under the policy as a matter of law and that fact questions remain for decision before the insurer may prevail upon those defenses.

The trial court erred in rendering summary judgment.

The judgment is therefore REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

TUTTLE, Chief Judge, DISSENTING:

With deference to the views of my colleagues, I must dissent. I am utterly unable to understand how or why a federal court should attempt, by what appears to me to be judicial fiat, to fashion a public policy for the state of Texas, a state that has never been known to be one that was callous to the interests of policyholders as against the insurers — that will inevitably invite the worst types of deception and fraud. Moreover, I am unable to distill from the opinion of the majority exactly what the public policy of Texas now is touching on the making of false statements or false swearing if such dishonesty does not occur in connection either with the application for the policy or in the formal proofs of loss.

Here, after the plaintiffs had filed suit on this floater policy seeking a recovery for the alleged loss of jewelry, Marianne Vernon, one of the plaintiffs, alleged to be the owner of $27,000 worth of the jewelry, filed a sworn affidavit to the effect that there had been no theft and that the claim of theft was a trumped-up claim in which she and her parents, the other insureds, had participated. Based on this affidavit the Insurance Company then filed its answer denying liability. Thereafter, attaching this affidavit to its motion, it moved for a summary judgment, to which, at the time, in the light of the pleadings and affidavits, it would clearly be entitled. In response to this motion for summary judgment, however, Marianne swore again, this time saying that what she had previously sworn to was false. She thereupon reasserted her claim against the Insurance Company. We take it, therefore, that the

principal assured, that is the owner of the substantial loss claimed, is a self-confessed perjurer, since in the majority opinion it is stated that Marianne's second affidavit is sufficient to satisfy the Texas requirements of an affidavit. She has sworn that she swore falsely when she told the Company by affidavit that she had "cooked up" the entire story of theft in order to save her boy friend from some unexplained trouble.

The trial judge, himself an experienced Texas judge, held, as I think he was required to do, that either Marianne's false affidavit that there had been no theft was a violation of the warranty against false swearing "before or after the loss" or the subsequent affidavit, in which she undertook to recant the earlier one, was false by the very nature of things, and that this would then be a violation of the warranty against false swearing.

As I understand the majority opinion, it is based on the general proposition that since the Texas statutes have provided that an insurance company may not rely upon untrue or false answers or statements *made in the application or contract* for insurance unless it is shown upon trial that the matter or thing represented was material to the risk or actually contributed to contingency or event upon which the policy became payable, and since it has also enacted a provision depriving an insurance company of a defense based upon a contract provision voiding a policy for false statements *made in proofs of loss* unless it is shown upon trial that the false statement was fraudulently made, misrepresented a fact material to the liability of the insurer, and actually misleading the insurer, these statutory provisions "bespeak the public policy of Texas in insurance matters." The opinion then seems to say that since the plain meaning of the words of the provision taken in their broadest possible scope would avoid the policy in the

event of "*any* falsely sworn statement by the insured, made at *any* time, under *any* circumstances, to *any* person or entity" would be an absurd construction, then it follows that this concededly false affidavit touching on the very question as to whether a loss had occurred, an affidavit admittedly knowingly and intentionally made by the assured, cannot be relied upon by the insurance company as a defense to the suit. The opinion does not tell us why. It simply says that, construed in the most literal and broadest possible scope "the provision in question would be in part void as contrary to the public policy of Texas."

The opinion then says, "We conclude that the provision does not extend to every false swearing, but only to those within the scope allowed by the public policy of the state. It does not extend to the affidavits made by Marianne Vernon, after denial of liability by Aetna and after action on the policy had commenced." This, it seems to me, is postulating and nothing more. The opinion then concludes with the statement, "It is apparent from what we have said that the mere fact of making inconsistent statements does not establish fraud or attempted fraud under the policy as a matter of law." The fact is that we do not have here "a mere fact of making inconsistent statements"; we have here an admittedly false affidavit, which by its very nature might affect the insurance company's investigation of whether or not an actual loss had occurred and whether or not it would be liable on the policy.

Realizing, out of the deepest respect which I hold for my distinguished colleagues, that I may read something more in the language of the opinion than is intended, I must nevertheless reject as erroneous and, I sincerely believe, as damaging to the entire fabric of the law, the characterizing of this open, blatant, perjury as a "mere fact of making inconsistent statements."

From some place outside the record the majority finds a basis for making the statement that the two kinds of false statements expressly referred to in the Texas statutes, "are the only kinds of statements, in the vast majority of cases, which the insured will ever make to the insurer, and are by far the most important which can be made." The truth is that these statutes do not touch upon false statements that may be made by an insured during the insurance company's investigation of the loss, or the insurance company's investigation as to whether there has been a theft. Although I have no more justification in speculating as to what kind of statements the insured is apt to make than has the majority in its estimate, it would seem to me that in at least an appreciable number of cases false statements impeding a fair investigation of the claimed loss by the company might be not only the larger in number but the most material and that they would also be the kind the legislatures and the courts would be most alert to prevent, and yet the majority opinion now holds that an agreement by an assured not to make false statements in connection with an investigation of a loss by an insurance company on pain of forfeiture of the policy, is against the public policy of the state of Texas.

I think this Court paid its respects to the kind of reasoning by which such public policy would be established by what we said in the case of *Chauchon v. American Central Insurance Company*, 5 Cir., 241 F. 2d 889, where we said at page 892:

> "The contract does not spell out that it is only false swearing, misrepresentation, concealment or fraud which is successful that voids the policy. Nor is there any reason why any such condition should be read into it. Clearly, in the absence of a statute, the law, which is founded on truth and justice, will not regard it as unsound that a person has lost the benefit of the con-

tract by wilful, immoral, dishonest acts which the contract itself condemns.

"Moreover, if the law out of some misgivings about the forfeitures, were to require that the insurer demonstrate that it had been misled to its prejudice by the fraud, the policy provision would both be virtually worthless and put a premium on dishonest dealings by the assured. For if, by its own investigation, inspired perhaps by suspicions of the assured's efforts to misrepresent, the insurer satisfied itself that a fraud had been attempted and declined to pay, such a rule would mean that the assured's claim would then stand as though no dishonest acts whatsoever had been practiced. The mendacious assured, surveying the possibilities and contemplating prospective tactics and strategy in the handling of his claim, would sense immediately that vis-a-vis himself and the underwriter, there be no risk at all in his deceit. If it worked, he would have his money and, at worst, could be compelled to disgorge only by affirmative suit by the insurer if the fraud were discovered in time to be legally or practicably effective. If it didn't work — if, before consummation, fraud was detected — he would suffer no disadvantage whatsoever. It would be an everything to win, nothing to lose proposition.

"Additionally, such a rule would cast the underwriter in a role for which it is unsuited and in a process which the general good, out of long experience, considers best performed by government machinery. Convinced, as here by its own investigation of the claim, of dishonest acts by the assured, it would then have to undertake the talks of segregating truth from untruth, ferreting out the honest from the dishonest, choosing the right from amongst the wrong with all or much of the factual material coming from one now considered to be morally unreliable.

"The public interest is not furthered by these likely consequences of reading into the contractual language

this burden nowhere expressed. A judge made policy which thus gives advantage to dishonesty will retard, not accelerate, the orderly adjustment of insurance losses. If the insurer, from the strong language of the contract interpreted in equally plain terms by the law, is entitled to assume that the assured is dealing honestly and fairly, asserting only that which in good faith is believed to be the substantial truth of the matter, the claim can be handled in a spirit and atmosphere of confidence. If, on the other hand, the insurer must realize that fraud is significant only if it is finally successful, that the slate is wiped clean if its own investigation uncovers the assured's cozening, the setting may then become one of the hostile antagonism, reluctance and apprehension forcing more, not less, litigation."

Although in the Chiaachou case this Court was construing the law of Florida, the situation was the same because there is no statute in Florida touching on the matter, nor, as conceded by the majority here, is there any statute of Texas touching this situation.

Moreover, I think the Texas case of *Modern Order of Praetorians* v. *Davidson*, 203 S.W. 379, establishes the law of Texas for the proposition that unless the Texas insurance laws themselves outlaw a defense as being against the public policy of that state, the courts have no power to do so. In that case the insured sought to rely upon the Texas statute above referred to touching upon false representations in an application for insurance. However, the Court of Civil Appeals of Texas decided that the statute applied only to stock companies and not to "fraternal insurance." The opinion of the court said, "In the absence of a statute to the contrary, false representations in an application for insurance, which the applicant warrants to be true, will avoid the policy, without reference to the materiality of such

statements." The court said that the failure of the Texas statute to include fraternal insurance as being covered by the stated public policy left the defense open in a suit on a fraternal insurance policy without requiring it to prove the materiality of the false statements made. In the light of such a policy as announced by the Texas courts, it seems that we are going far afield indeed in fashioning a policy, even though not fully articulated in this opinion, to the effect that a provision against false swearing occurring after loss, is void under the public policy of the state of Texas.

I would affirm the order of the trial court dismissing the complaint on summary judgment.

[SEAL]

A true copy

Test:

/s/ EDWARD W. WADSWORTH
Edward W. Wadsworth

U. S. Court of Appeals, Fifth Circuit
May 18, 1962

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. VERNON, ET AL.,
Plaintiffs,
v.
AETNA INSURANCE COMPANY,
Defendant.

CIVIL ACTION
No. 13,172

Percy Foreman and Cire & Jamail (George E. Cire), of Houston, Texas; for plaintiffs.

Barrow, Bland & Rehmet (David Bland), of Houston, Texas; for defendant.

NOVEMBER 29, 1960

The case is before the court on defendant's First Amended Motion for Summary Judgment.

Plaintiffs, C. A. Vernon and daughter, Marianne Vernon (named in the policy of insurance sued upon as Marianne Vernon Lorentzen), residents of Texas, base their claim for relief against defendant, Aetna Insurance Company, hereinafter called Aetna, a corporate resident of the State of Connecticut, upon a personal property floater policy of

insurance to which is attached a schedule of jewelry specifically insured for the sum of $49,150. The policy further covers unscheduled personal property, other than jewelry, in the amount of $26,000; and there is no coverage afforded by the policy on unscheduled jewelry other than $250 coverage for any one loss.

The policy affords all-risk coverage, subject however to the exclusions contained in the policy.

Plaintiffs state in their original complaint that on or about January 17, 1960, articles of jewelry valued at $27,700 were taken from the home of plaintiffs in Bryan, Texas, under circumstances that constituted burglary or theft.

Heretofore the court has dismissed defendant Phil Nabors, a resident of the State of Texas, from this suit because of the failure of the complaint to state a claim against him upon which relief could be granted. Defendant Aetna removed the case from the District Court of Brazos County, Texas, alleging properly that the resident defendant was fraudulently joined in order to defeat the removal jurisdiction of this court. Consequently, complete diversity of citizenship exists, and the amount involved is in excess of $10,000, giving this court jurisdiction under the provisions of Title 28, U. S. Code, Sections 1332 and 1441.

On May 20, 1960, Marianne Vernon appeared before a Notary Public in and for Brazos County, Texas, signed, subscribed and swore to a statement in which she confessed that the alleged burglary and theft described in plaintiffs' complaint was a complete hoax and a scheme and conspiracy devised to defraud Aetna into paying the proceeds of its policy upon a feigned act of burglary committed by C. A. Vernon. According to this sworn statement, the feigned act of burglary and the entirety of the scheme and conspiracy

was known to Marianne Vernon at the time it was carried out.

Aetna filed its original motion for summary judgment on September 8, 1960, to which it attached a copy of the said affidavit of Marianne Vernon. A hearing was set by the court on defendant's original motion for summary judgment on October 31, 1960. Prior to such hearing, plaintiffs, along with affidavits of Mr. and Mrs. C. A. Verion, filed another sworn statement dated October 28, 1960, of Marianne Vernon, in which she stated that the hoax and feigned act of burglary described in her affidavit of May 20, 1960, was not true and was completely false. This affidavit says that Marianne Vernon was induced to make the affidavit of May 20, 1960, by a man with whom she was in love. This second sworn statement further asserted that she, Marianne Vernon, simply concocted the facts stated in the May 20th statement about the participation of her father and mother in the feigned act of burglary and theft in order to protect said man with whom she was in love and prevent him from going to the penitentiary for the theft. I will not speculate upon the emotions and reactions of this woman, but one wonders how long she would love and trust him after she knew he had stolen her jewelry.

The two statements, under oath, given by Marianne Vernon are in direct conflict, one of which must be false and untrue as to the material facts covering whether an insured loss actually occurred.

The policy of insurance sued upon by plaintiffs contains the following language in paragraph 9 thereof:

> "This policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the Assured touching any matter relating

to this insurance or the subject thereof, whether before or after a loss."

Language of similar import contained in insurance policies consistently has been held operative and effective by the courts. *Chaachou v. American Central Insurance Company*, 241 Fed. (2d) 889 (5 Cir., 1957); 5 Appleman, Insurance Law and Practice, Section 3587; 29 American Jurisprudence, Section 1419, page 329.

Aetna invokes the above quoted language and contends in its motion for summary judgment that the two affidavits given by Marianne Vernon, as a matter of law, constitutes fraud, attempted fraud, false swearing, concealment and misrepresentation, touching the subject matter of the insurance policy.

The court is convinced that Aetna's position is correct and that its First Amended Motion for Summary Judgment should be granted.

Admitting that the original statement, under oath, given by Marianne Vernon was false, nevertheless, plaintiffs urge the application of Article 21.19, Insurance Code of Texas, which is quoted as follows:

> "Any provision in any contract or policy of insurance issued or contracted for in this State which provides that the same shall be void or voidable, if any misrepresentations or false statements be made *in proofs of loss or of death*, as the case may be, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract or policy, unless it be shown upon the trial of such suit that the false statement made in such *proofs of loss or death* was fraudulently made and misrepresented a fact material to the question of the liability of the insurance company upon the contract of insurance sued on, *and that the insurance company was thereby misled and caused to waive or lose some valid defense to the policy.*" (Emphasis supplied.)

In urging the application of this statute, plaintiffs contend that the May 20th statement of Marianne Vernon was the equivalent of a proof of loss or, in any event, was a statement made in support of a claimed loss given after Aetna invoked paragraph 11 of the policy sued upon which is quoted, in part, as follows:

> "The Assured shall submit, and so far as is within his or their power shall cause all other persons interested in the property and members of the household and employees to submit, to examinations under oath by any persons named by the Company, relative to any and all matters in connection with a claim and subscribe the same: . . . "

Plaintiffs' contention is overruled.

The application of Article 21.19 above quoted by its plain meaning is confined to "misrepresentations and false statements made in proofs of loss or death". It does not apply to statements made under oath for the purpose of cleansing the insured's conscience and disclaiming any rights under the policy, if the May 20th sworn statement be true; or for the purpose of protecting her lover at the expense of her parents, if the October 28th sworn statement be true. Consequently, the insured, Marianne Vernon, has been guilty of false swearing of the type condemned by the insurance policy, but to which Article 21.19 is not applicable. The decision in *Fidelity-Phenix Fire Ins. Co.* v. *Sadau*, 167 S.W. 334 (Tex. Civ. App. 1914, no writ of error history), and other similar decisions are not in point.

Further, the record reflects that this suit was filed on April 29, 1960, twenty-one days prior to the first sworn statement. Article 21.19 contemplates that the misrepresentations and false statements to which it is applicable must be made prior to the commencement of litigation. *Commercial Casualty Insurance Co., et al.* v. *Holmes*, 206 S.W. (2d) 882 (Tex. Civ. App. 1947, no writ of error history).

Neither is the holding in *Fireman's Fund Ins. Co. v. Reynolds*, 85 S.W. (2d) 826, cited by plaintiffs, applicable here. In that case it was held that a defense based on false statements made upon examination of the insured after loss upon the insurance company's invoking a provision of the policy similar to that quoted above in paragraph 11 of the insurance policy, is subject to the requirements of Article 21.19. As has been demonstrated, Marianne Vernon's giving of the sworn statement of May 20th was for other reasons and purposes than contemplated by this decision.

Even if it be assumed that the sworn statements given by Marianne Vernon are of the character to which Article 21.19 is applicable, this court holds as a matter of law that the misrepresentation and false statements therein contained are of such a nature as to constitute a valid defense.

If it is assumed that the May 20th statement is true, it is obvious that Aetna has no liability because no insured loss occurred. If it is assumed that the May 20th affidavit is false and the one of October 28th is true (and this is what plaintiffs contend), it is then equally obvious that Marianne Vernon is not only guilty of false swearing, but guilty of misrepresentations that were relied upon by Aetna to its monetary detriment in instituting a defense to the suit and asserting its cross-action. This conduct constitutes active fraud which prevents recovery by Marianne Vernon.

As was pointed out in Chaachou, supra, the defense that an insurance company loses when faced with the claims of an insured who admittedly has been guilty of false swearing and misrepresentations which were relied upon by the insurance company to its monetary damage is the right

to have its insured deal with the company in honesty and fairness and not to put the insurer to the task of "segregating truth from untruth, ferreting out the honest from the dishonest, choosing the right from amongst the wrong, with all or much of the factual material coming from one now considered to be morally unreliable."

Lastly, plaintiffs contend that a fact issue of estoppel is raised by the record before the court as to whether the person allegedly inducing Marianne Vernon to give the sworn statement of May 20th was acting as an agent or representative of Aetna.

Here, again, plaintiffs' contention must be rejected. The only assertion in the record before the court that said person was a representative of Aetna is contained in the unsworn Plea in Opposition to Defendant's First Amended Motion for Summary Judgment signed by plaintiffs' counsel. This is not the proper form for submitting facts on motions for summary judgment. Such facts must be presented under oath by persons competent to testify. Rule 56, Federal Rules of Civil Procedure.

However, the factual statements offered by plaintiffs' counsel do not raise even an inference that the person allegedly inducing Marianne Vernon to make the sworn statement of May 20, 1960, was acting in any capacity for Aetna. Consequently, if such facts were considered, a fact issue is not raised.

The statement of Marianne Vernon of May 20, 1960, contains the following language:

> "The jewelry was mostly mine. The diamond bracelet that was valued at $25000.00 was mine and so was the small bracelet that was valued at $2000.00. A couple of the other pieces was mine also."

This portion of Marianne's statement of May 20, 1960, remains uncontroverted by her affidavit of October 28, 1960, and the affidavits of her mother, Bertie Reed Vernon, and her father, C. A. Vernon, filed in opposition to defendant's original motion for summary judgment of the same date. Accordingly, the record is clear that $27,000 of the $27,700 claim is that of Marianne Vernon, from which she is barred from recovery as herein set forth. There remains only the $700 claim of C. A. Vernon, which is not within the jurisdiction of this court, even if the totality of the $5,000 exemplary damage claim is pursued.

Simply restated, there was fraud practiced by plaintiffs, whichever of plaintiffs' views is accepted. If Marianne Vernon's affidavit of May 20, 1960, is true, the claim asserted by plaintiffs is fraudulent. If it is not true, plaintiffs have certainly perpetrated a fraud upon defendant, and violated the terms of the contract, by representing false facts and concealing the true.

Fraud on the part of one of the joint contractors is attributable to the other. Federal Insurance Co. v. Wong, et al., 137 Fed. Supp. 232 (S.D. Calif. 1956), and Texas cases cited therein. Jones v. Fidelity & Guaranty Ins. Corp., Tex. Civ. App., 250 S.W. (2d) 281; Bridges v. Commercial Standard Ins. Co., Tex. Civ. App., 252 S.W. (2d) 511.

The clerk will notify counsel to draft and submit judgment accordingly.

JOE INGRAHAM

.....

United States District Judge

APPENDIX C

United States Statutes

Title 15, USC, Section 1011 — Declaration of Policy

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Title 15, USC, Section 1012 — Regulation by State Law

"Federal law relating specifically to insurance; applicability of Certain Federal laws after June 30, 1948."

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business."

(b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically relates to the business of insurance: * * * ."

Title 28, USC, Section 1652 (1948) — State Laws as Rules of Decision.

"The laws of the several States, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in all the Courts of the United States in cases where they apply."

Rule 56(g) Federal Rules of Civil Procedure.

"*Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

APPENDIX D

Texas Statutes

Art. 21.16, Insurance Code. Misrepresentation by Policyholder

"Any provision in any contract or policy of insurance issued or contracted for in this State which provides that the answers or statements made in the application for such contract or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case. Acts. 1951, 52nd Leg., ch. 491."

Art. 21.17, Insurance Code. Misrepresenting Loss or Death

"Any provision in any contract or policy of insurance issued or contracted for in this State which provides that the same shall be void or voidable if any misrepresentations or false statements be made in proofs of loss or of death, as the case may be, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract or policy, unless it be shown upon the trial of such suit that the false statement made in such proofs of loss or death was fraudulently made and misrepresented a fact material to the question of the liability of the insurance company upon the contract of insurance sued on, and that the insurance company was thereby misled and caused to waive or lose some valid defense to the policy. Acts 1951, 52nd Leg., ch. 491."

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 193

AETNA INSURANCE COMPANY,
Petitioner,

v.

C. A. VERNON AND MARIANNE VERNON,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PERCY FOREMAN
GEORGE E. CIBE
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BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

IN

OPINION BELOW .....

QUESTIONS PRESENTED ...

STATEMENT OF THE CASE

ARGUMENT .....

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In The

Supreme Court of the United States

October Term, 1962

No. 193

Aetna Insurance Company,

Petitioner,

v.

C. A. Vernon and Marianne Vernon,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is now reported in 301 F. 2d 86.

QUESTIONS PRESENTED

Respondents submit the following as more accurately stating the questions presented by petitioner's application for writ of certiorari.

1. Does the decision of the Court of Appeals applying the statutory and common law of Texas to this case in any way conflict with the spirit and letter of the McCarran Act of 1945 (15 U.S.C. 1011-12)?

ARGUMENT

COUNTERPOINT ONE

(In Response to Petitioner's Point 1(a) and 2)

THE COURT OF APPEALS' APPLICATION OF TEXAS LAW TO THIS CASE FULFILLS THE REQUIREMENT OF THE McCARRAN ACT OF 1945 (15 U.S.C. 1011-12) THAT THE SEVERAL STATES REGULATE THE BUSINESS OF INSURANCE WHERE POSSIBLE.

Argument and Authorities

Petitioner contends that the Court of Appeals for the Fifth Circuit should not have made a determination of the applicability of Article 21.19, Texas Insurance Code, to the case at hand; and that by doing so the Court has violated the terms of the McCarran Act of 1945 (15 U.S.C. 1011-12).

Just how the court's application of Texas law to an insurance question could violate an act which declares continued regulation of the insurance business by the States to be in the public interest, petitioner does not attempt to explain. There is no explanation because, of course, there is no violation! By applying Texas law to this problem, the court has fulfilled the declared policy of the Act.

Wilburn Boat Company v. Firemen's Fund Insurance Company, 348 U.S. 310 (1955) gives no support to Petitioner's contention as that case deals with the entirely different question of whether a contract of marine insurance should be interpreted under general maritime law or under state law.

Even without the McCarran Act of 1945, the Court of Appeals was still under a duty to apply the law of Texas to this case, to the extent that it could do so. When the jurisdiction of a Federal court is invoked upon the ground

of diversity of citizenship, of a case is removed to the Federal court on that ground, the Federal court on matters of general law is governed by, and must apply the law of the state, and follow precedents established by state decisions. *Erie v. Tompkins*, 304 U.S. 64 (1938); 28 U.S.C. 1652. And, where a question of state law is not settled by state decisions, it is the duty of a Federal court to decide the question when necessary to the rendition of its judgment. *Huddleston v. Dwyer*, 322 U.S. 232 (1944). Further, the fact that the state law problem confronting the court may be difficult to solve does not relieve a Court of Appeals of its duty to make a decision. *Spiegel's Estate v. Commissioner of Internal Revenue*, 335 U.S. 701 (1949); *Meredith v. Winter Haven*, 320 U.S. 228 (1943).

COUNTERPOINT TWO

(In Response to Petitioner's Point 1(c) and 3)

THE DECISION OF THE COURT OF APPEALS FOLLOWS THE MANDATE OF THE TEXAS LEGISLATURE AND THE SUPREME COURT OF TEXAS REQUIRING THAT PROVISIONS OF THE REVISED TEXAS STATUTES BE LIBERALLY CONSTRUED AND THAT POLICIES OF INSURANCE BE INTERPRETED AND CONSTRUED LIBERALLY IN FAVOR OF THE INSURED AND STRICTLY AGAINST THE INSURER.

Argument and Authorities

In Article 10, Sec. 8 of the Revised Texas Statutes the Texas Legislature has expressly required that:

> "The rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes [and the said statutes] shall constitute the law of this State respecting

the subjects to which they relate; and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice."

See *Clark v. W. L. Pearson & Co.*, 121 Tex. 34, 39 S.W. 2d 27, syl. 9 (1931). And a cardinal rule in Texas for statutory interpretation and construction is to seek out the legislative intent from a general view of the enactment as a whole and, once the intent has been ascertained, to construe the statute so as to give effect to the purpose of the legislature. *Board of Insurance Com'rs. v. Great Southern Life Ins. Co.*, 150 Tex. 258, 239 S.W. 2d 803 syl. 1 (1951). Further, it is a settled rule in Texas that policies of insurance will be interpreted and construed liberally in favor of the insured and strictly against the insurer. *Continental Gas Co. v. Warren*, 254 S.W. 2d 762, syl. 1 (1953); *Providence Washington Ins. Co. v. Proffitt*, 150 Tex. 207, 239 S.W. 2d 379, syls. 4 & 5 (1951). See 32 Tex. Jur. 2d, Insurance Sec. 60, p. 121.

Following this clear Texas pattern for the construction and interpretation of statutes and insurance policies, the majority of the Court of Appeals quite properly ruled that Article 21.19, Texas Insurance Code, is applicable to false statements made subsequent to the institution of suit upon the policy, brought after denial of liability by the insurer. To have decided otherwise would have been to place a far too restricted and technical interpretation on the phrase "proofs of loss" and would have done violence to the obvious intent of Article 21.19 and the Texas Insurance Code generally. (See *Fireman's Fund Ins. Co. v. Reynolds*, 85 S.W. 2d 826, syls. 3-5 (Tex. Civ. App. 1935, error ref'd).

The two Texas Supreme Court cases cited by petitioner at page 10 of its brief deal with rules of statutory construction not applicable here, and they are not in conflict

with the decision of the Court of Appeals or the Texas cases which respondents have cited above.

As for construction, interpretation and application of the clause in question, the Court of Appeals had to turn to the decisions of other states inasmuch as there are no Texas decisions on point. This course was incumbent on the court if it were to carry out its duty to decide the substantive question before it. The court found persuasive those authorities which hold that once an insurance company has denied its liability under the policy and plaintiffs have filed suit, the rights of the parties are fixed as of that time and the insurance company cannot take advantage of any breach of policy conditions occurring after suit is begun. *American Paint Service v. Home Insurance Co. of N.Y.*, 246 F. 2d 91 (3rd Cir. 1957); *Third National Bank v. Yorkshire Insurance Co.*, 218 Mo. App. 660, 267 S.W. 445 (1924); *Deitz v. Providence Washington Ins. Co.*, 33 W. Va. 526, 11 S.E. 50 (1890); See 5 Appleman, *Insurance Law and Practice*, Sec. 3362 p. 379, n. 71; 7 *Couch, Cyclopedia of Insurance Law*, Sec. 1557, p. 5516 n. 13; Annotation 64 ALR 2d 962 Sec. 2.

Certainly the majority of Court of Appeals for the Fifth Circuit was justified in concluding that this interpretation of the fraud and false swearing clause was the preferable one to be applied in Texas in light of the Texas requirement that terms of an insurance policy are to be construed liberally in favor of the insured and strictly against the insurer.

Under the circumstances of this case, respondent submit that the Supreme Court's general policy of leaving undisturbed a Court of Appeals holding on a question of state law should be followed. *Hoffman v. Stuart*, 317 U.S. 154 (1942).

COUNTERPOINT THREE

(In Response to Petitioner's Points 1(b), 1(c), 1(d), 2(a) and 4)

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT DIRECTLY OR IN PRINCIPLE WITH DECISIONS OF THIS COURT, OTHER COURTS OF APPEALS, OR ITS OWN DECISIONS.

A. Decision of This Court and Other Courts of Appeals

Argument and Authorities

The majority of the Court of Appeals for the Fifth Circuit has determined that Article 21.19, Texas Insurance Code, is applicable to the affidavit in question and prevents forfeiture; and that the fraud and false swearing clause in question is not applicable because respondent, Marianne Vernon's conflicting affidavits were made after respondents' claim was rejected by petitioner. These determinations of Texas law do not conflict with any of the Federal decisions cited by petitioner.

Claflin v. Franklin Insurance Company, 110 U.S. 81 (1884); *Globe & Rutgers Fire Insurance Company v. Stallard*, 68 F. 2d 237 (4th Cir. 1934); and *Columbian Insurance Company of Indiana v. Modern Laundry*, 277 F. 355 (8th Cir. 1921) all being decisions reached prior to *Erie v. Tompkins*, 304 U.S. 64 (1938) naturally assumed the right (established by *Swift v. Tyson*, 16 Pet. (U.S.) 1 (1842)) to determine for themselves as to the unwritten or common law. Now, of course, by reason of *Erie*, Federal courts must apply the common law of the state in which they are located. Thus, there is no longer a body of Federal common law with which the decision of the Court of Appeals below could come in conflict.

B. Other Decisions of The Court of Appeals for The Fifth Circuit

Argument and Authorities

As pointed out by the Court of Appeals below *Chauchoa v. American Central Insurance Company*, 241 F. 2d 889 (5th Cir. 1957) is not contrary to this decision. First, because this was an appeal from a summary judgment the Court of Appeals accepted as undisputed, respondents' contention that respondent Marianne Vernon's first affidavit was not made to "cheat deceive and cause the insurer to do other than it would have done had the truth been told" (as required by *Chauchoa*), but because she was improperly induced to make the affidavit by a person acting for petitioner. Secondly, *Chauchoa* was decided under the law of Florida, and the court at page 892, n. 5 specifically predicated its decisions upon ". . . the absence of statute, e.g., Article 21.19, Texas Insurance Code, V.A.T.S.; *Firemen's Fund Ins. Co. v. Reynolds*, 85 S.W. 2d 826 (Tex. Civ. App. 1935, error ref'd); . . ."

As for *Firemen's Fund Insurance Co. v. Hibbard Boat Co.*, 300 F. 2d 631 (5th Cir. 1962), there is no conflict because in that case the misrepresentations in question were made at the time the insurance policy was obtained and after coverage was unreasonably sought to justify the in suits. The statute there in question was Article 21.16 Texas Insurance Code, not Article 21.19. Also, the *Hibbard* case did not involve a misrepresentation that occurred after suit had been fi

COUNTERPOINT FOUR

(In Response to Petitioner's Points 2(b) and 3)

PETITIONER HAS NOT PRESENTED ANY EVIDENCE SUFFICIENT TO IMPAIR THE TECHNICAL VALIDITY

OF RESPONDENT MARIANNE VERNON'S SECOND AFFIDAVIT; NOR HAVE ATTORNEYS FOR RESPONDENTS ACTED IN BAD FAITH IN CONTINUING TO URGE THE VALIDITY OF THE SECOND AFFIDAVIT.

Argument and Authorities

As respondents stated to the Court of Appeals, it is indeed strange than an advocate would resort to such a strained interpretation of the facts in order to charge his adversaries with bad faith! Nowhere in the transcript submitted by Aetna does Marianne Vernon say that her second affidavit was not given under oath, as alleged by Aetna. And Petitioner attributes statements to the notary public which he simply did not make. He did not testify that he had both religious and individual scriples against administering an oath. (Petitioner's brief 5). What he did say is completely set out in respondents' statement of the case (*supra* 3) and is also summarized in the opinion of the Court of Appeals at footnote 5. Under this state of facts, the Court below properly found that under Texas law petitioner had made no showing sufficient to impair the technical validity of the second affidavit. *Vaughan* v. *State*, 177 S.W. 2d 59 (Tex. Crim. App. 1943).

Petitioner predicates its charge of bad faith on the fact that one of respondents' attorneys of record chose to inquire into the procedural validity of Marianne Vernon's second affidavit, and then subsequently respondents' attorneys of record continued to assert the affidavit's validity before the Court of Appeals. The response to their contention is obvious. Respondents' attorneys did not prove at the preliminary hearing that the affidavit was not given under oath. To the contrary, it appeared to them then and it appears to them now that the affidavit's procedural integrity was not impaired by the notary public's testimony. This

legal conclusion on the part of respondents' attorneys has been confirmed by the Court of Appeals. Petitioner's contention of bad faith is, respondents submit, without any semblance of merit!

CONCLUSION

Respondents reiterate that it is significant to note which side in this controversy seeks full exposure of the truth. Surely respondents do not fear it — they ask only that their contentions be put to the test of a trial on the merits. No, it is Aetna who wishes to postpone that day of reckoning forever!

A Majority of the Court of Appeals for the Fifth Circuit has correctly determined and applied Texas law to this case, and that decision does not conflict with the McCarran Act of 1945, with decisions of this Court, with decisions of other Courts of Appeals, with its own decisions, or with decisions of the Supreme Court of Texas.

Therefore, respondents respectfully submit that this petition should be denied.

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Service of the above brief is hereby acknowledged by Petitioner's Attorney of record this ..... day of ....., 1962.

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